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BY ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Lifeline Connects Coalition, Boomerang Wireless, LLC and Easy Wireless Notice of Oral *Ex Parte* Presentation; WC Docket Nos. 17-287, 11-42, 09-197**

Dear Ms. Dortch:

On October 31, 2017, John Heitmann and Joshua Guyan of Kelley Drye & Warren LLP met on behalf of the Lifeline Connects Coalition (Coalition) (Telrite Corporation, Prepaid Wireless Group, Global Connection Inc. of America and Assist Wireless, LLC), Boomerang Wireless, LLC (Boomerang) and Easy Wireless with Claude Aiken, Wireline Advisor to Commissioner Mignon Clyburn to discuss the Draft Lifeline Item released by the Commission on October 26, 2017.[1] We described the Draft Lifeline Item as a drastic departure from the Chairman's claims to support affordable broadband for low-income consumers suffering from the digital divide.[2] Because the item eliminates resellers from the Tribal Lifeline program and

[1] *See Draft Bridging the Digital Divide for Low-Income Consumers*, WC Docket No. 17-287 et al., Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, FCC-CIRC1711-05 (Oct. 26, 2017) (Draft Lifeline Item).

[2] In a recent statement, Chairman Pai confirmed "I support including broadband in the Lifeline program to help provide affordable, high-speed Internet access for our nation's poorest families." FCC News Release, Statement of FCC Chairman Ajit Pai On the Future of Broadband in the Lifeline Program, Mar 29, 2017. Even in his dissent to the Lifeline Modernization Order, then Commissioner Pai noted his view that "modernizing the Lifeline program to support affordable, high-speed Internet access for our nation's poorest families is a worthy goal." *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Third Report and Order,

proposes to eliminate resellers from the entire Lifeline program, despite the fact that 69 percent of all Lifeline subscribers (and 76 percent of wireless subscribers)[3] are currently served by resellers, we urged Commissioner Clyburn's office to work to change the item so that it does not threaten to suddenly and dramatically widen the affordability gap that places tens of millions of low-income Americans on the wrong side of the digital divide.

Draft Fourth Report and Order – Gutting Tribal Enhanced Lifeline

In the Draft Fourth Report and Order, the Commission proposes to limit enhanced Tribal reimbursements to rural Tribal areas and to subscribers that receive service from facilities-based eligible telecommunications carriers (ETCs).[4] We explained that these are major changes to the Tribal Lifeline program that require further notice and comment, especially because it appears that the Commission has once again failed to conduct a consultation with the Tribal Nations, which it has committed to do.[5] In its 2000 Policy Statement, the Commission committed to

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Further Report and Order, and Order on Reconsideration, FCC 16-38 (2016) (Lifeline Modernization Order), Dissenting Statement of Commissioner Ajit Pai, 1.

[3] According to the USAC Lifeline Disbursement Tool, available at http://www.usac.org/li/tools/disbursements/default.aspx.

[4] *See* Draft Lifeline Item, ¶¶ 3-9, 21-28.

[5] Regrettably, this is the second time in a row that the Commission has failed to adhere to its Tribal consultation obligations when making significant changes to the Tribal Lifeline program. In 2015, the Commission decided unilaterally to "depart from the staff's prior informal guidance and interpret the 'former reservations in Oklahoma' within section 54.400(e) of the Commission's rules as the geographic boundaries reflected in the Historical Map of Oklahoma 1870-1890 (Oklahoma Historical Map)." *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, FCC 15-71, ¶ 257 (2015) (2015 Lifeline Order). The 2015 Lifeline Order was adopted without prior consultation with the affected Tribes, and instead directed the Wireline Competition Bureau and Office of Native Affairs and Policy "to actively seek government-to-government consultation with Tribal Nations in Oklahoma on the efficacy and appropriateness of other maps and geospatial information assets developed both by federal agencies and individual Tribal Nations." *Id.*, ¶ 265. Many Tribes expressed frustration in response to this consultation process as inconsistent with the Commission's long-standing policy of engaging with Tribes prior to taking action that would impact Tribal Nations. *See, e.g.*, Statement of Gary Batton, Chief, Choctaw Nation of Oklahoma, WC Docket No. 11-42 et al. (Aug. 7, 2015) ("If the FCC and other federal policy makers had properly followed government-to-government protocols requiring tribal consultation in advance of making a federal policy decision affecting tribal communities, the tribes could have cleared up the FCC's confusion earlier this year."); Letter from Bill John Baker, Principal Chief of the Cherokee Nation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 11-42 et al. (Oct. 21, 2015) ("The lack of

"consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."[6]

The Draft Lifeline Item also presents for the first time a construct to limit enhanced Lifeline support to rural Tribal lands based on the E-rate program.[7] Consistent with the Draft Lifeline Item's criticism of the 2016 Lifeline Modernization Order's port freeze and equipment requirements, the merits of this new proposal must then be subject to notice and comment rulemaking. Two weeks' time is insufficient to assess the impact of this proposal on Lifeline-eligible consumers, Tribal Nations, and ETCs.

In addition, the Draft Lifeline Item assumes – without rational explanation or record evidence – that without resellers, all of the funding somehow will continue and somehow will pass through to facilities-based carriers.[8] However, the Commission appears to have no evidence as to why that would be so or whether affordable voice and broadband services would be available to the estimated 55 percent of Tribal Lifeline subscribers (and nearly 62 percent of Tribal wireless Lifeline subscribers)[9] that would lose enhanced service if resellers are eliminated. For example, the one major wireless facilities-based provider, Virgin Mobile/Assurance Wireless (owned by Sprint) is not a designated ETC in Oklahoma and does not serve Tribal lands in any state. Are there other facilities-based wireless ETCs from which residents on Tribal lands can receive comparably affordable wireless service? Will those offerings hold without competition? Verizon Wireless and T-Mobile have demonstrated no real interest in the retail Lifeline business and AT&T Wireless has no wireless Lifeline subscribers.[10] The "nationwide" wireless facilities-based carriers do, however, have existing networks, and networks being built and improved,

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consultation prior to the adoption of a new map re-designating and carve out of tribal lands in Oklahoma raises serious concern for future rulemakings that may seek to limit vital Universal Service Funds for tribal lands and residents."). The Draft Lifeline Item, which neither suggests that the affected Tribal Nations have been consulted nor indicates that the Commission will seek consultation after adoption, is similarly an affront to Tribal sovereignty and continues a troubling pattern of the Commission improperly enacting policy changes that impinge on Tribal lands across the country.

[6] *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, FCC 00-207, 4 (June 23, 2000).

[7] *See* Draft Lifeline Item, ¶ 5.

[8] *See id.*, ¶ 26.

[9] According to the USAC Lifeline Disbursement Tool, available at http://www.usac.org/li/tools/disbursements/default.aspx.

[10] *See id*.

which are funded and justified in part by wholesale revenues. These providers cost effectively serve Tribal Lifeline communities through their partnerships with resellers.

Though not an effective alternative to the wireless services that low-income Americans want (just like Americans of greater means), the Draft Lifeline Item fails to examine whether there are comparable and comparably affordable wireline voice and broadband Lifeline service options available in all Tribal areas where resellers currently provide service. Indeed, this is not likely to be true because wireline ETCs are only required to provide Lifeline in the areas where they receive high cost funding.[11] The Draft Lifeline Item also fails to explore, in cases where comparable wireline service offerings may be available, whether Lifeline Tribal residents can afford those services and make arrangements to pay for them on a monthly basis when so many do not have bank accounts or credit cards.[12] Because the changes the Draft Lifeline Item would adopt could result in massive consumer harm, confusion and service disconnection, they should be raised and considered in the context of the Notice of Proposed Rulemaking (NPRM) while the Commission conducts the proper and necessary Tribal consultation. Rushing to conclusion on issues of this magnitude threatens to undermine the integrity of the Lifeline program and the broader Universal Service Fund.

Order on Reconsideration – Eliminating Incentives for Carriers to Offer Broadband

The draft Order on Reconsideration eliminates both the 12 month broadband and the 60 day voice benefit transfer freezes.[13] We discussed the fact that the 12 month port freeze was adopted primarily "to incentivize greater up front investments from providers."[14] The 12 month port freeze enabled ETCs to increase their offerings to meet the broadband minimum service standards and provide Wi-Fi and hotspot-capable smartphones often for free to low-income consumers. It was the primary driver of the transition to broadband Lifeline service offerings

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[11] Many wireline providers filed notices of forbearance from Lifeline broadband requirements in December 2016. *See e.g.*, Letter from Anisa Latif, AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 11-42 (Nov. 23, 2016) (generally seeking forbearance from Lifeline broadband obligations in all census blocks for CLEC and Mobility entities and in census blocks where it does not receive CAF II high-cost support for ILEC entities).

[12] In a customer survey reported by the Lifeline Connects Coalition and conducted by one of its members, 77 percent of surveyed customers were unbanked or underbanked. *See* Lifeline Connects Coalition Written *Ex Parte* Presentation, WC Docket Nos. 11-42, 09-197, 10-90, at n.4 (Mar. 21, 2016).

[13] *See* Draft Lifeline Item, ¶ 31-36.

[14] Lifeline Modernization Order, ¶ 389.

from voice, which is something that Chairman Pai had proclaimed as an accomplishment.[15] The dramatic increase in Lifeline broadband subscribership since December 2, 2016 would not have occurred without the 12 month port freeze.

The Draft Order on Reconsideration says the purpose of the 12 month port freeze was to facilitate market entry and disingenuously concludes that there is no evidence that new entrants were or are having difficulty entering the Lifeline market.[16] As the Commission is well-aware, there are 35 compliance plans and 35 federal ETC petitions pending with the Commission, which have not been acted on for years.[17] It is that approval bottleneck that is causing the difficulty in entering the Lifeline market. At the same time the Commission claims to be concerned about restricting consumer choice through the port freeze[18] (which is hollow since many subscribers to voice and broadband services willingly enter into one or two year contracts or phone leasing arrangements), it is the Commission itself that is failing to approve new entrants that would supply the competition and consumer choice.

We further explained that at the very least, those subscribers that are currently in a 12 month port freeze should remain in their port freeze until the year is up. Those customers were enrolled understanding that a 12 month port freeze would apply, and they were provided with enhanced service and equipment offerings because of the 12 month port freeze rule that was in effect at the time of enrollment. If the Commission does eliminate the 12 month port freeze, it should do so only on a prospective basis for enrollments that occur on or after the effective date of the rule change.

While the 60 day voice benefit transfer freeze had a similar justification in the Lifeline Modernization Order to the 12 month broadband port freeze, the 60 day port freeze was initially implemented by USAC in the NLAD prior to its codification. We explained that this was done by USAC not because USAC was trying to incentivize market entry or more robust service offerings, but rather as an administrative measure to protect program integrity and to minimize costs imposed on USAC and the carriers by consumers who transfer their Lifeline benefit

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[15] *See* Statement of FCC Chairman Ajit Pai on the Future of Broadband in the Lifeline Program (Mar. 29, 2017) ("Right now, over 3.5 million Americans are receiving subsidized broadband service through the Lifeline program from one of 259 different Eligible Telecommunications Carriers (ETCs). And according to the latest available figures, the number of customers receiving subsidized broadband service has increased by over 16 percent during my Chairmanship.").

[16] *See id.*, ¶ 32.

[17] *See* https://www.fcc.gov/general/lifeline-compliance-plans-etc-petitions.

[18] *See* Draft Lifeline Item, ¶ 33.

between providers in a short period of time to collect phones or services. Without a 60 day port freeze, a Lifeline applicant can enroll with one ETC on the second of the month, receive a (potentially free) phone and use his or her allocation of voice or data and then transfer his or her benefit to another ETC a few minutes or days later to collect another phone and another allocation of minutes and/or data. The applicant could continue to "flip" between providers throughout the month. In the end, only the ETC that serves the subscriber as of the first of the following month could submit a claim for Lifeline reimbursement. So the Lifeline program would only pay for one Lifeline service, but multiple times for associated data dips with each NLAD enrollment. All of the interim ETCs during that month would have provided a month's service with no Lifeline reimbursement. This amounts to a tremendous waste for Lifeline providers and harms their ability to serve other legitimate low-income subscribers. Finally, we noted that the 60 day port freeze combats the perception of fraud and abuse in the Lifeline program because the collection of multiple phones and phone services in a month is perceived in the media and by the public as waste and abuse of the program, even if the program only pays one reimbursement.

Memorandum Opinion and Order – Eliminating Consumers' Ability to Choose Between Limited 3G Cellular Data and Unlimited Premium Wi-Fi

In the Memorandum Opinion and Order section of the Draft Lifeline Item, the Commission removes the uncertainty that existed surrounding whether Premium Wi-Fi services offering greater than 3G speeds can qualify for reimbursement as mobile broadband.[19] We explained that unfortunately the Commission's clarification comes at the expense of a valuable choice for low-income consumers. Telrite's Premium Wi-Fi service is mobile broadband that is available in a wide variety of locations, leveraging a curated network of millions of access points that include in-home hotspots in residential neighborhoods, and in multi-dwelling units, busy commercial corridors, local businesses, transportation hubs, community anchor institutions, and other common and public areas.

Coupled with a Wi-Fi and hotspot capable device, unlimited Premium Wi-Fi can offer a subscriber a homework gap solution that cannot be matched by a limited allotment of typically much slower 3G cellular data. We asserted that it's a shame that the Commission once again inserts its choice instead of allowing low-income consumers to make their own choices in services, including increasingly popular service plans featuring secure access to curated Wi-Fi enabled broadband networks. Sadly, the Draft Lifeline Item indicates that the Commission's traditional technology neutral and pro-innovation policy priorities are reserved for the benefit only of those who do not qualify for Lifeline support.

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[19] *See* Draft Lifeline Item, ¶ 44.

Notice of Proposed Rulemaking – Radically Reducing the Lifeline Program by Eliminating Lifeline Resellers

The drastic proposal to eliminate resellers from the Lifeline program[20] would have a massive and unprecedented negative impact on low-income Americans. Because of its potential to massively disrupt essential communications services for Lifeline-eligible consumers – including Veterans, single mothers, the elderly, and those reeling in the wake of recent hurricanes and other natural disasters, this program shattering proposal should be removed from the item or at least moved to the Notice of Inquiry. We informed Mr. Aiken that the vast majority (69 percent) of Lifeline subscribers currently receive Lifeline-discounted voice or broadband services from resellers and 76 percent of wireless Lifeline subscribers receive their service from a reseller.[21] Notably, the Commission does ask questions like "How would this proposal impact the availability and affordability of Lifeline broadband services?" and "How would this proposal impact the number of Lifeline providers participating in the program and the availability of quality, affordable Lifeline broadband services?" But these open-ended questions that go to the fundamental nature and purpose of the Lifeline program belong in the Notice of Inquiry with the questions about appropriately targeting Lifeline resources, the minimum charge, and whether service providers, or indeed the Commission through the actions in this draft item, are engaging in digital redlining.

Further, the draft NPRM claims that "[w]e do not expect that this approach would impact the forbearance relief from section 214(e)(1)(A)'s facilities requirement."[22] The Commission has more than a decade of precedent granting forbearance to Lifeline providers from the "own facilities" requirement in section 214(e)(1)(A), including granting blanket forbearance in 2012, because non-facilities based Lifeline meets the three-part test for forbearance in section 10(a) of the Communications Act.[23] When that test is met, the statute says the Commission "shall forbear."[24] The Commission cannot adopt a rule requiring Lifeline ETCs to provide service using their own facilities when the Communications Act requires that the agency shall forbear

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[20] *See* Draft Lifeline Item, ¶¶ 60-74.

[21] According to the USAC Lifeline Disbursement Tool, available at http://www.usac.org/li/tools/disbursements/default.aspx.

[22] Draft Lifeline Item, ¶ 66.

[23] *See Lifeline and Link Up Reform and Modernization, Lifeline and Link Up, Federal-State Joint Board on Universal Service, Advancing Broadband Availability Through Digital Literacy Training*, WC Docket No. 11-42, WC Docket No. 03-109, CC Docket No. 96-45, WC Docket No. 12-23, Report And Order and Further Notice of Proposed Rulemaking, FCC 12-11, ¶¶ 361-81 (Feb. 6, 2012) (Lifeline Reform Order).

[24] 27 U.S.C. § 160(a).

from requiring such facilities where the three-part forbearance test was met. The Draft Lifeline Item leaves few clues and fails to seek comment on how this lawfully can be done. Rather than toy with the essential communications services of 7 million of the most vulnerable Americans, the Commission ought to set forth such ideas for radical reforms likely to be subject to serious legal challenges in the Notice of Inquiry.

Finally, the draft NPRM states that the Commission believes it has the authority "under Section 254(e) of the Act to provide Lifeline support to ETCs that provide broadband service over facilities-based broadband-capable networks that support voice service."[25] We explained that this true statement should not be interpreted to mean that the Commission only has authority to provide Lifeline support to facilities-based ETCs. Rather, the Court of Appeals for the Tenth Circuit in considering a challenge to the support for broadband in the Connect America Fund Transformation Order, interpreted the provisions of section 254 of the Act to give the Commission broad authority to direct that USF recipients use some of the USF funds "to *provide services or* build facilities related to services that fall outside of the FCC's current definition of 'universal service.'"[26] Therefore, we asserted that the Commission must make clear that it has the authority to support Lifeline broadband provided by non-facilities-based providers even if it reclassifies broadband as an information service and it is therefore no longer a "supported service" in the Lifeline program.

Notice of Inquiry

In the Notice of Inquiry, the Commission once again raises the question of whether it should impose a minimum charge requirement for Lifeline services, which it calls a "maximum discount level" (new for "skin-in-the-game").[27] However, the same challenges remain that caused the Commission to previously reject a required minimum charge for Lifeline service. We asserted that the Commission correctly determined in 2012 that "the Lifeline program is serving the truly neediest of the population in the most dire economic circumstances and for whom even a routine charge is an excessive financial burden."[28] This was in part because "requiring a minimum consumer charge could be burdensome for those low-income consumers who lack the ability to make such payments electronically or in person, potentially undermining the program's

[25] Draft Lifeline Item, ¶ 72.

[26] *Direct Commc'ns. Cedar Valley, LLC v. FCC (In re FCC 11-161)*, 753 F.3d 1015, 1046 (10th Cir. 2014) (emphasis added). *See* Comments of the Lifeline Connects Coalition on Restoring Internet Freedom, WC Docket No. 17-108 (filed July 17, 2017) (also noting that the Commission has clear Title I ancillary authority to support Lifeline broadband provided by resellers).

[27] *See* Draft Lifeline Item, ¶¶ 111-16.

[28] Lifeline Reform Order, ¶ 267.

goal of serving low-income consumers in need."[29] Nothing has changed to render these conclusions invalid.

We look forward to working with the full Commission and all stakeholders on ways to modify the Draft Lifeline Item so that it realizes its potential to help remedy the digital divide rather than exacerbate it. Pursuant to Section 1.1206(b) of the FCC's rules, this letter is being filed electronically.

Respectfully submitted,

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[29] *Id.*, ¶ 266.